

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STEVEN B. DUNN and
TOR H. PETERSON

Appeal No. 2007-0826
Reissue Application 09/902,965¹
Patent 6,125,548
Technology Center 3700

Decided: June 20, 2007

Before CAROL A. SPIEGEL, SALLY GARDNER LANE and JAMES T.
MOORE, *Administrative Patent Judges*.

SPIEGEL, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The Reissue Application on appeal was filed on 11 July 2001. The Reissue Application seeks to reissue U.S. Patent 6,125,548, issued 3 October 2000,

I. Statement of the case

This is an *ex parte* appeal under 35 U.S.C. § 134(a) (2002) from rejected claims 5-15, all of the claims pending in this Application. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

Appellants claim an apparatus for supporting and drying articles, such as baby bottles, comprising a plurality of pegs mounted on a tray so as to be movable between a first storage position and a second operative position.

Claims 5 and 13 are independent claims and read as follows:

5. An apparatus for supporting baby bottles and related accessories for drying, comprising:

a tray having a bottom portion that is adapted to be supported by an underlying surface, an upper portion and at least two sidewalls;

a plurality of pegs extending outwardly from said upper portion, each of said pegs being sized and arranged so as to be able to support a baby bottle; and

at least one axle for mounting said pegs for common arcuate movement between a first storage position, wherein said entire peg is positioned adjacent to said upper portion for storage and packaging of said apparatus, and a second, operative position, wherein said peg is positioned so as extend outwardly from said upper portion, said axle being mounted for rotation within a pair of opposed journal holes that are defined in said sidewalls, said journal holes being elevated with respect to said upper portion of said tray so as not to receive water from said upper portion of said tray.

13. An apparatus for supporting articles for drying, comprising:

a tray having a bottom portion that is adapted to be supported by an underlying surface and an upper portion;

based on Application 09/513,094. The real party-in-interest is said to be Munchkin, Inc.

a plurality of pegs extending outwardly from said upper portion, each of said pegs being sized and arranged so as to be able to support a baby bottle; and

at least two axles, each of said axles being connected to at least two of said pegs for mounting said pegs for common arcuate movement between a first storage position, wherein said entire peg is positioned substantially adjacent to said upper portion for storage and packaging of said apparatus, and a second, operative position, and wherein said axles are oriented so that movement of said pegs on a first of said axles when moving from said first storage position to said second operative position is substantially in the same rotational direction as movement of said pegs on a second of said axles when moving from said first storage position to said second operative position.

Claim 6 adds a “frictional means connected to said axle for frictionally engaging said upper portion of said tray” when the pegs are moved between the first and second positions to the apparatus of claim 5, while claim 7 further requires the frictional means to comprise a “cam member connected to said axle and having a surface that is constructed and arranged to bear against said upper portion of said tray.” Claim 8 requires that the frictional means “bears against a horizontal portion of said upper portion of said tray.”² Claim 9 adds a “location means connected to said axle for locking said pegs in said second, operative position” to the apparatus of claim 5, while claim 10 requires the location means to comprise “a cam member connected to said axle having a first surface that contacts a cam stop surface that is defined in said upper face of said tray.” Claims 11 and 12 require the cam member of claim 10 to be “elevated with respect to

² Apparently, claim 8 should depend from either claim 6 or claim 7, instead of from claim 5, for proper antecedent basis.

adjacent areas of said upper face of said tray” and to comprise “a second surface . . . constructed and arranged to bear against the upper face of said tray,” respectively.

Claim 14 adds a “cutout area” on a side of the apparatus of claim 13 for facilitating lifting the apparatus by a user, while claim 15 further requires the cutout are to be “positioned beneath said one end of said upper face.”

The Examiner rejected all pending claims, claims 5-15, under 35 U.S.C. § 102(b) as anticipated by Slipp. The Examiner also provisionally rejected claims 5-15 under nonstatutory obviousness-type double patenting over claims 4-7 of copending Application 09/902,904.

The following prior art³ was relied upon by the Examiner:

Slipp	GB 160,098	17 Mar. 1921
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Slipp qualifies as prior art under 35 U.S.C. § 102(b).

In deciding this appeal, we have considered *only* the following: (a) the Reissue Specification, including original claims, (b) the Non-Final Rejection mailed 23 November 2005, (c) the Appeal Brief (“Br.”) filed 24 May 2006, (d) the Examiner’s Answer (“Answer”) mailed 29 June 2006, (e) the PTO bibliographic data sheet for the Reissue Application on appeal, (f) U.S. Patent 6,125,548, which is the patent sought to be reissued, (g) Slipp and (h) claims 5-15 on appeal.

The rejections under review in this appeal are:⁴

(1) Claims 5-15 stand rejected under 35 U.S.C. § 102(b) as anticipated by Slipp.

³ The reader should know that no reference to *et al.* is made in this opinion.

⁴ The Examiner has withdrawn the rejection of claims 5-15 under 35 U.S.C. § 102(b) as anticipated by Son (U.S. Patent 2,472,028) (Answer, 3).

(2) Claims 5-15 stand provisionally rejected on the ground of nonstatutory obviousness-type double patenting over claims 4-7 of copending Application 09/902,904.

We AFFIRM.

II. Anticipation

To anticipate a claim, a prior art reference must, either expressly or inherently, disclose each and every limitation in the claim. *Verdegaal Bros. v. Union Oil Co.*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir.), *cert. denied*, 484 U.S. 827 (1987); *RCA Corp. v. Applied Digital Data Sys., Inc.*, 730 F.2d 1440, 1441, 221 USPQ 385, 388 (Fed. Cir. 1984). “Absence from the reference of any claimed element negates anticipation.” *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1571, 230 USPQ 81, 84 (Fed. Cir. 1986). The doctrine of inherency may not be used to establish anticipation unless a prior inherency can be established as a certainty. Probabilities or possibilities will not be sufficient to establish an inherent event. *Continental Can Co. U.S.A., Inc. v. Monsanto, Co.*, 948 F.2d 1264, 1269, 20 USPQ2d 1746, 1749 (Fed. Cir. 1991).

During examination, “claims are to be given their broadest reasonable interpretation consistent with the specification.” *In re Sneed*, 710 F.2d 1544, 1548, 218 USPQ 385, 388 (Fed. Cir. 1983). “Generally, particular limitations or embodiments appearing in the specification will not be read into the claims.” *Enron GmbH v. ITC*, 151 F.3d 1376, 1384, 47 USPQ2d 1725, 1731 (Fed. Cir. 1998) (quoting *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 867, 228 USPQ 90, 93 (Fed. Cir. 1985)). Furthermore, when the claim limitation in issue involves a means plus function clause, proper claim

interpretation requires that such a claim “shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.” 35 U.S.C. § 112, sixth paragraph; *In re Bond*, 910 F.2d 831, 833, 15 USPQ2d 1566, 1568 (Fed. Cir. 1990) (referring to the specification to interpret the scope of a means plus function claim when reviewing a finding of anticipation); *In re Iwashashi*, 888 F.2d 1375, 1379 n.1, 12 USPQ2d 1908, 1912 n1. (Fed. Cir. 1989) (“Section 112 Para. 6 cannot be ignored when a claim is before the PTO any more than when it is before the courts in an issued patent.”). Thus, in order to meet a means-plus-function limitation, the prior art “must (1) perform the identical function recited in the means limitation and (2) perform that function using the structure disclosed in the specification or an equivalent structure.” *Carroll Touch, Inc. v. Electro Mechanical Sys., Inc.*, 15 F.3d 1573, 1578, 27 USPQ2d 1836, 1840 (Fed. Cir. 1993).

A. Are claims 5-15 unpatentable under § 102(b) as anticipated by Slipp?

1. Slipp

Slipp describes a collapsible drying rack (p. 1, ll. 10-11) comprising (i) a tray **a** and **b** having a bottom face adapted to be supported by an underlying surface and an upper face (p. 1, ll. 73-38; p. 2, ll. 30-33; Figs. 1 and 3), and (ii) a plurality of pegs **c** and **d** extending outwardly from said upper face, each peg being sized and arranged so as to be able to support an article (p. 1, ll. 79-80; p. 2, ll. 4-12; Figs. 1-4), wherein each of the pegs is permanently mounted to the tray by horizontal bar **e** in such a manner as to be movable between a first folded storage position, wherein the entire peg is

positioned adjacent to the upper face of the tray for storage and packaging of the drying rack (Fig. 4), and a second open operative position, wherein the peg is positioned to extend outward from the upper surface, so as to enable the peg to support an article (Fig. 3) (p. 1, ll. 17-28 and 80-85; p. 2, ll. 4-12 and 21-26). Any liquid drainage from the articles being dried falls into the upper trough **a** of the tray, which subsequently can be emptied (p. 1, ll. 49-51; p. 2, ll. 12-16). Slipp further describes horizontal bar **e**, to which pegs **c** and **d** are mounted, as fitting snugly into the ends of the tray **a** and **b** such that the pegs pivot about a single axis **f** (p. 1, ll. 83-86; Figs. 3 and 4). According to Slipp, the pegs will remain in the vertical operative position until collapsed by hand (p. 1, ll. 28-35; p. 2, ll. 17-20).

2. the issue

The issue is whether Slipp discloses each and every limitation of claims 5-15.

a. Appellants' position

Appellants contend that Slipp fails to disclose

(i) that the entire peg is positioned adjacent to the upper portion of the tray for storage, as recited in independent claims 5 and 13 (Br., 7-8 and 11-13).

(ii) any of the "frictional means" or "location means," as recited in claims 6-12 (Br., 8-10).

(iii) orientation of the axles so that the pegs on the first and second axles move in the same rotational direction when moved between the storage and operative positions, as recited in independent claim 13 (Br., 13-14).

(iv) cutout areas for lifting, as recited in claims 14 and 15 (Br., 14-15).

b. the Examiner's position

According to the Examiner,

(i) if a peg is next to the upper surface of the tray as shown in Slipp's folded drying rack, then the entire peg is adjacent to the upper surface, as required by claims 5 and 13, and the intended use (for storage and packaging) is met by the folded drying rack of Slipp (Answer, 4 and 7).

(ii) Slipp inherently anticipates the claimed "frictional means" because friction causes the pegs to remain in a second operative position until the hand of a user overcomes friction to collapse the pegs toward a first storage; and, the cam of claims 6 and 10 reads on the horizontal bar **e** of Slipp which is shown as pivoting against a horizontal portion of the upper portion of the tray in Figures 1-4 between a first storage and a second operative position (Answer, 4-6).

(iii) the downward rotation direction of pegs **c** and **d** shown in Figure 3 of Slipp is in the same planar rotation as required by claim 13 (Answer, 8).

(iv) Figures 3 and 4 of Slipp show a cutout area under bottom region **b** that allows a user to lift the tray (Answer, 8).

3. analysis

A determination that a claim is anticipated under 35 U.S.C. § 102(b) involves two analytical steps – first, the claim must be given its broadest reasonable interpretation, where necessary; and, second, the construed claim must be compared to the prior art reference to determine if each and every

claim limitation is found either expressly or inherently in that single prior art reference. *In re Crish*, 393 F.3d 1253, 1256, 73 USPQ2d 1364, 1366 (Fed. Cir. 2004).

(i)/(iii) claims 5 and 13

Claims 5 and 13 both recite that “said entire peg is positioned adjacent to said upper portion for storage and packaging of said apparatus” as recited in claims 5 and 13. We construe “adjacent to” as meaning “near to.” A peg that is entirely near to the upper portion of a tray when the peg is in its collapsed position for storage as described by Slipp (see Slipp Fig. 4) satisfies the limitation of claims 5 and 13 that “said entire peg is positioned adjacent to said upper portion for storage and packaging of said apparatus.” Appellants argue that this claim limitation should be more narrowly construed to require that none of the peg remain above the sidewall of the tray when the tray is folded (Br., 8). However, Appellants have not pointed to, and we do not find, where Appellants' Specification requires such a narrow claim construction. Indeed, it appears that approximately half the length of pegs 18 are above the upper face 16 of tray 12 in the embodiment of the invention depicted in Figure 2 of Appellants' Reissue Application. Therefore, a broad construction of “adjacent to” is not inconsistent with Figure 2 of Appellants' Reissue Application. Thus, we find that Slipp describes the limitation of claims 5 and 13 that “said entire peg is positioned adjacent to said upper portion for storage and packaging of said apparatus.”

Claim 13 also requires the axles upon which the pegs are mounted to be oriented to move in the same rotational direction when the pegs are moved between the storage and operative positions. Appellants argue that

this claim limitation means that all of the axles/bars on which the pegs are mounted rotate in the substantially the same counterclockwise or clockwise direction as shown in Figure 2 of its Reissue Application (Br., 13-14).

However, claim 13 does not require the axles to rotate in the same "clockwise or counterclockwise" direction. The Examiner contends it is all a matter of perspective, i.e., axles f of Slipp rotate in the same downward direction when pegs c and d move from the operative position to the storage position as shown by the downward arrows in Slipp Figure 3 (Answer, 8). Absent a claimed basis for requiring the axles to rotate in the same "clockwise or counterclockwise" direction, we find that Slipp describes the limitation of claim 13 that the axles upon which the pegs are mounted to be oriented to move in the same rotational direction when the pegs are moved between the storage and operative positions.

Therefore, we find that independent claims 5 and 13 are anticipated under § 102(b) by Slipp.

(ii) claims 6-12

Claim 6 adds a "frictional means connected to said axle for frictionally engaging said upper portion of said tray" when the pegs are moved between the first and second positions to the apparatus of claim 5, while claim 7 further requires the frictional means to comprise a "cam member connected to said axle and having a surface that is constructed and arranged to bear against said upper portion of said tray." Claim 8 requires that the frictional means "bears against a horizontal portion of said upper portion of said tray."

Appellants' Specification describes a "frictional means connected to said pegs for frictionally engaging said upper portion of said tray when said pegs are moved between a first storage position and a second operative position" as a rotating or sliding contact between two structures in the upper portion of the tray which resists relative motion until pushed by a user in a desired direction, e.g., nipple member supporting axle **28, 30** in rotating contact with the upper portion of the tray at a mounting hole in its sidewall (Specification, col. 4, ll. 24-33).

In Slipp, pivoting bars **e**, on which pegs **c** and **d** are mounted, are in contact with the tray **a** and **b** at an upper portion of the tray. The pegs **c** and **d** rotate between first storage and second operative positions when a user manually collapses the pegs, thereby frictionally engaging, i.e., rotating the bars **e** against a horizontal portion of the upper portion of the tray at pivot point **f**. [Slipp, p. 1, ll. 28-35 and 83-86; p. 2, ll. 17-20; Figs. 3 and 4.] Thus, Slipp describes performing the identical function recited in the means limitation function of claim 6 using the same or an equivalent structure of that disclosed in Appellants' Specification.

In response to Appellants' contention that Slipp does not disclose a "cam member" as recited in claim 7 (Br., 9), the Examiner explained that the recited "cam member" read on the horizontal bar **e** of Slipp when giving "cam member" its broadest reasonable interpretation (Answer, 6). In other words, the position of the Examiner is essentially that a "cam member" simply a rotating or sliding piece in a mechanical linkage, such as the rotatable horizontal bar **e** described in Slipp. Appellants have not disputed

the Examiner's interpretation of "cam member," e.g., by pointing to where their Specification more narrowly defines "cam member."

Therefore, we find that claims 6-8 are also anticipated under § 102(b) by Slipp.

Claim 9 adds a "location means connected to said axle for locking said pegs in said second, operative position" to the apparatus of claim 5, while claim 10 requires the location means to comprise "a cam member connected to said axle having a first surface that contacts a cam stop surface that is defined in said upper face of said tray." Claims 11 and 12 require the cam member of claim 10 to be "elevated with respect to adjacent areas of said upper face of said tray" and to comprise "a second surface . . . constructed and arranged to bear against the upper face of said tray," respectively.

Appellants' Specification describes the structure corresponding to the claimed "locating means" as follows (col. 4, ll. 1-23):

[a]s may best be seen in FIGS. 1 and 4, each axle **22, 24, 28, 30** includes at least one locating structure **26**, the purpose of which is to lock the respective axle in a rotational position that corresponds to the second operative position shown in FIG. 1. In the illustrated embodiment, first and second axles **22, 24** include two such locating structures **26**, while the third and fourth axles **28, 30** which support the shorter nipple support members **32**, are equipped with but one locating structure **26**. The construction of the locating structures **26**, however, is uniform throughout the four axles **22, 24, 28, 30**. As may be seen in FIG. 4, locating structure **26** includes a cam member **43** having a lower surface **44** that is

constructed and arranged to bear against the upper face **16** of tray **12**, and a forward surface **46** that is constructed and arranged to come into contact with a rear surface **44** of a cam stop **42** that projects upwardly and is unitary with the upper face **16** of tray **12**. FIG. 1 and FIG. 4 both depict the locking structure **26** in the second, operative position. The path between the first and second positions is indicated in FIG. 4 by arrow **46**. The nipple support member **32** is prevented from bending backwardly in the direction from the first storage position by contact with the forward surface **46** of cam member **43** with the rear surface **44** of cam stop **42**.

According to the Examiner, the claimed location means is described "in the third full paragraph of the first page" of Slipp (Answer, 6). However, the third full paragraph of the first page of Slipp does not describe Slipp's collapsible rack, but rather a prior art rack having pegs fixed to or integral with the side frames of the rack and using struts between the side frames to keep them in position (Slipp, p. 1, ll. 17-28). In short, the Examiner has neither attempted to construe the claim limitation "location means" nor identify which structure(s) of Slipp's rack correspond to the "location means" recited in claim 9. Accordingly, the Examiner has failed to set forth a sufficient factual basis for finding that claim 9 or any of the claims dependent on claim 9, i.e., claims 10-12, is anticipated by Slipp. *Med. Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1220, 68 USPQ2d 1263, 1275 (Fed. Cir. 2003) (anticipation is a question of fact).

(iv) claims 14 and 15

Claim 14 adds a "cutout area" on a side of the apparatus of claim 13 for facilitating lifting the apparatus by a user, while claim 15 further requires

the cutout area to be “positioned beneath said one end of said upper face.” The Examiner contends that a cutout area exists under bottom region **b** of Slipp's tray, as seen in Slipp Figures 3 and 4, which allows a user to lift the tray (Answer, 8). According to Appellants' Specification, the purpose of the cutout area is to facilitate a user lifting the apparatus as well as to prevent vapor lock from occurring between the apparatus and a smooth underlying surface, e.g., a countertop (Specification, col. 2, ll. 55-58). Appellants argue that the apparatus disclosed by Slipp appears to be substantially flat, without sufficient space for facilitating lifting the apparatus by a user (Br., 14).

We interpret the language "for facilitating lifting of said apparatus by a user" recited in claim 14 as merely a statement of intended use which does not qualify or distinguish the structural apparatus of claim 14 over Slipp. *In re Sinex*, 309 F.2d 488, 492, 135 USPQ 302, 305 (CCPA 1962) (statement of intended use in an apparatus claim failed to distinguish over the prior art apparatus). Slipp Figures 3 and 4 illustrate a cutout area under bottom region **b** beneath at least one end of the apparatus. Whether the cutout area is used to facilitate a user lifting the apparatus or to prevent vapor lock from occurring between the apparatus and an underlying surface, does not distinguish the structural apparatus of claims 14 and 15 from the structural apparatus of Slipp.

Therefore, we find that claims 14 and 15 are anticipated under § 102(b) by Slipp.

III. Provisional obviousness-type double patenting

Claims 5-15 stand provisionally rejected on the ground of nonstatutory obviousness-type double patenting over claims 4-7 of copending Application 09/902,904 (Answer, 3).

Appellants do not contest this rejection.

Therefore, we summarily sustain the Examiner's provisional rejection of claims 5-15 on the ground of nonstatutory obviousness-type double patenting over claims 4-7 of copending Application 09/902,904.

IV. Order

Upon consideration of the record and for the reasons given, it is ORDERED that the Examiner's rejection of claims 5-8 and 13-15 under 35 U.S.C. § 102(b) as anticipated by Slipp is AFFIRMED;

FURTHER ORDERED that the Examiner's rejection of claims 9-12 under 35 U.S.C. § 102(b) as anticipated by Slipp is REVERSED;

FURTHER ORDERED that the Examiner's provisional rejection of claims 5-15 on the ground of nonstatutory obviousness-type double patenting over claims 4-7 of copending Application 09/902,904 is AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR 1.136.(a)

AFFIRMED

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Appeal 2007-0826
Reissue Application 09/902,965
Patent 6,125,548

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